Filed 11/3/16 P. v. Hambek CA3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. APRIL MARIE HAMBEK, Defendant and Appellant.	C078974 (Super. Ct. No. CM039788)

The trial court denied defendant April Marie Hambek probation and sentenced her to six years in state prison following her negotiated plea of guilty to first degree burglary. On appeal, defendant contends the trial court promised her a probationary sentence if she entered into a plea agreement with the People. She claims her plea was neither knowing nor voluntary, because she was misled by what she characterizes as the trial court's "assurance" of probation. Because the record does not support her basic premise that she was assured probation as part of her plea agreement or otherwise, we shall affirm the

judgment without reaching defendant's additional claims, all of which hinge on the validity of this underlying premise.

PROCEDURAL BACKGROUND

Because the facts of defendant's offense are not relevant to the issues raised on appeal, we do not detail them here. It suffices to say that defendant was charged by information with first degree burglary and a prior prison term. (Pen. Code, §§ 459, 667.5, subd. (b).)[1] She entered a negotiated plea of guilty to the burglary charge in exchange for dismissal of the prior prison term enhancement and two trailing misdemeanor cases.[2] The trial court denied probation and sentenced defendant to the upper term of six years in state prison.

Marsden *Hearing and Pre-Plea Chambers Discussion with Counsel*

In October 2014 at the trial readiness conference, defendant made a motion for new appointed counsel. (*People v. Marsden* (1970) 2 Cal.3d 118.) In the closed *Marsden* hearing, defendant complained that she felt "a lot of negativity" from her attorney; he responded that her feeling stemmed from the fact that he had told her that if she went to trial she would be convicted. He added that he had talked with the People about a resolution including probation, but knew that defendant's "chances at probation won't be so good" if she were convicted at trial of all charges, including the prior prison term allegation. He referenced the possibility of a chambers conference between the

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[1] Further undesignated statutory references are to the Penal Code.

[2] Defendant's plea agreement included a waiver of her right to a direct appeal. She contends in her briefing that the provision in her plea agreement waiving her right to direct appeal is inapplicable where, as here, her appeal attacks the validity of the plea itself. The People ignore the issue. We agree with defendant and reach the merits of her claim. (See *In re Uriah R.* (1999) 70 Cal.App.4th 1152, 1157 ["the issue of whether the guilty plea was informed and voluntarily made will always remain open for appellate review"].)

lawyers and court. The court denied the *Marsden* motion but added that it was willing to meet with the lawyers "about seeing whether we can come up with a fair resolution." The court added that it would "let the attorneys talk and see where we are."

After the conclusion of the *Marsden* hearing and before the plea, in defendant's absence, the attorneys met with the trial court in chambers for an unreported discussion. On appeal, the parties have stipulated to a settled statement regarding that discussion, agreeing that "the attorneys do not recall in great detail" what happened at the meeting, but that they "generally discussed the evidence they believed would be presented at trial and the possibility of [defendant] changing her plea" with the judge. The trial court "indicated to defense counsel and the prosecutor that he would be inclined to give [defendant] a probationary sentence, provided that she followed all orders of the court and did not commit any new offenses prior to her sentencing." The settled statement contains no additional information.

The Plea Agreement and Plea

Upon returning to the courtroom from chambers, defense counsel asked for a break to speak with his client. The record reflects a break, but not its length. Defense counsel then informed the court that defendant wished to enter a negotiated plea of guilty to the charged offense in exchange for dismissal of the prior prison term allegation and two trailing misdemeanor cases. No mention of any agreed-upon or indicated sentence was made. The parties provided a written plea form to the court, executed by defendant and her counsel, and the court queried defendant about the form and defendant's understanding thereof. Defendant's initials on the form acknowledged that she was not induced to enter the plea by any promise or representation of any kind other than the district attorney's promise to dismiss the special allegation and open cases with a waiver pursuant to *People v. Harvey* (1979) 25 Cal.3d 754. Defendant also initialed acknowledgment of a maximum sentence of six years in prison, and that the case was prison presumptive. She acknowledged that her plea could result in *revocation* of her

probation in Butte County or other jurisdictions. She did *not* acknowledge that the case was a "county lid" or "no immediate state prison" case, nor is there any other provision or addition to the form in which an agreement to any specific sentence, whether probationary or otherwise, is even suggested. She signed the plea agreement and acknowledged in open court that she had gone over the plea agreement with counsel. The plea form also contained defense counsel's signature attesting to the fact that counsel reviewed the form with defendant, explained each of defendant's rights to her, answered all of defendant's questions regarding her plea, discussed with defendant "the content, substance, and meaning of all items and paragraphs" initialed by her, and discussed with defendant the facts of the case, the consequences of her plea, the elements of the offense, and the possible defenses.

The court took and accepted defendant's plea, granted the People's motion to dismiss the prior prison term allegation and the two trailing misdemeanor cases, and referred all matters to the probation department for a report. The court instructed defendant to "make and keep" her appointment with probation, noting, "It's your responsibility to be interviewed by them so when we come back to court, we have a report and we're ready to go forward." Defendant stated she understood. The court further admonished defendant as follows:

"[THE COURT]: And [defendant], obviously, make sure that there's no problems between now and then. Hopefully it will be a good report from Probation and we can go forward. But you need to make sure you stay out of trouble.

"[DEFENDANT]: I am.

"[DEFENSE COUNSEL]: And Your Honor, I reemphasized to [defendant] that the Court had indicated that you were inclined at this point to grant probation, even though it would require a finding of an unusual case. And that's based on what [the prosecution] and I shared with you. Certainly if something comes up along the way, that

could very well change the Court's perspective of the case. And that would not be good for [defendant].

"[THE COURT]: Right. The main thing is just stay out of trouble. . . ."

The court ordered defendant to report to probation no later than October 31, 2014.

The Probation Report, Defendant's Failure to Appear, and Sentencing

Defendant failed to report to probation until November 3, 2014. According to the report, defendant denied guilt for her crime of conviction and claimed not to recall having admitted guilt to police. The report noted that, subsequent to her probation interview, defendant tested positive for marijuana and methamphetamine. The report also noted defendant continued in her drug abuse and had "not taken any steps to modify her long standing drug and alcohol addiction, or make any positive strides in her life to becoming a self-supporting productive member of society." The probation department recommended the court deny probation and impose an upper term sentence. The report made no reference to a stipulated, indicated, or otherwise promised or suggested sentence.

The probation report included as an attachment defendant's (undated) handwritten letter to probation where she does appear to impliedly admit her guilt at least to larceny, writing that she "put [her]self in a tough spot financially [and] one thing led to another." When writing about her criminal history and current plea, she states that she "pled guilty to burglary after a year of fighting with my attorney. Other charges were dropped." She makes no mention of any sentencing agreements or expectations. She does indicate that her plan for the future is to "get a job and get on my feet," and to "stay completely out of trouble" to shore up her relationships with her children.

Defendant failed to appear for sentencing on February 25, 2015. The court issued a warrant for her arrest.

At the March 11, 2015, sentencing hearing, the court first announced it was inclined to follow the probation officer's recommendation of the upper term prison sentence. The People concurred and submitted. Defense counsel asked the court to find unusual circumstances based on defendant's past mental health issues (not relevant here), but did not argue the court had previously promised defendant probation or otherwise indicated probation was the *appropriate* sentence or even an option. Defense counsel asked for the midterm sentence if the trial court was not inclined to grant probation.

The trial court denied probation, concluding defendant did not meet the criteria for an unusual case finding. The court also noted it would otherwise have denied probation based on "[t]he nature, seriousness, and circumstances of this case; her prior record of criminal conduct indicates a pattern of regular and increasingly serious criminal conduct; and her prior performance on probation was unsuccessful." The court imposed the upper term of six years in state prison, noting multiple aggravating factors and none mitigating.

Defendant filed a timely notice of appeal, and later obtained a certificate of probable cause.

DISCUSSION

Defendant contends the trial court promised her a probationary sentence if she entered into a plea agreement with the People. She claims her plea was neither knowing nor voluntary because she was misled by what she characterizes as the trial court's "assurance" of probation. She argues her plea was coerced and induced by the trial court's promise of probation. The People respond by characterizing the trial court's comments as an indicated sentence but arguing no error occurred. As we will explain, we agree with neither party.

Simply put, the record contains no evidence of anything other than a standard plea agreement between the People and defendant, where defendant pled to one count and the other charges and allegations were dismissed in return for the plea, with no agreement as to the appropriate sentence. The only mention of sentencing in the plea agreement referenced a maximum of six years in prison. The trial court merely voiced to counsel in chambers (reiterated by defense counsel in open court after defendant's plea) that it was leaning toward (e.g. "inclined" toward) the most lenient of the possible sentences, probation, should the rest of the case go well for defendant. That inclination toward leniency was not made part of the plea agreement, and there is nothing in the record showing it induced or otherwise encouraged defendant's acceptance of the People's offer.

" 'Judicial approval is an essential condition precedent to the effectiveness of the '[plea] bargain' worked out by the defense and prosecution.' [Citation.] Because the charging function is entrusted to the executive, 'the court has no authority to substitute itself as the representative of the People in the negotiation process and under the guise of "plea bargaining" to "agree" to a disposition of the case over prosecutorial objection.' [Citation.] [¶] On the other hand, '[w]here the defendant pleads "guilty to all charges . . . so all that remains is the pronouncement of judgment and sentencing" [citation], "there is no requirement that the People consent to a guilty plea" [citation]. In that circumstance, the court may indicate "what sentence [it] will impose if a given set of facts is confirmed, irrespective of whether guilt is adjudicated at trial or admitted by plea." [Citation.]' [Citation.]" (*People v. Clancey* (2013) 56 Cal.4th 562, 569-570; accord *People v. Allan* (1996) 49 Cal.App.4th 1507, 1516.) "An indicated sentence is not a plea bargain, or a contract between the defendant and the court, or a '*promise* that the sentence will be imposed. Rather, the court has merely disclosed to the parties at an early stage—and to the extent possible—what the court views, on the record then available, as the appropriate sentence so that each party may make an informed decision.' " (*People v. Smith* (2014) 227 Cal.App.4th 717, 730, quoting *Clancey*, at p. 575.)

"[W]e review a claim that a trial court entered into an improper plea bargain for abuse of discretion. 'Accordingly, we ask whether the trial court's findings of fact are supported by substantial evidence, whether its rulings of law are correct, and whether its application of the law to the facts was neither arbitrary nor capricious.' " (*People v. Clancey*, *supra*, 56 Cal.4th at p. 578.)

On careful inspection, we conclude the trial court's representation in chambers to counsel that it was "inclined to give [defendant] a probationary sentence, provided that she followed all orders of the court and did not commit any new offenses prior to her sentencing" did not amount to an indicated sentence, much less a judicially brokered plea agreement. Nor did defense counsel's understandable use of the term "indicated" (rather than "stated" or "said" or some other term meaning verbally expressed, telling the court it had "indicated that [it was] inclined at this point to grant probation") transform the court's preliminary and tentative take on the case thus far into an indicated sentence.

As we have described, we find nothing in the record before us to suggest that the trial court discussed any aspect of the plea bargain with defendant prior to entry of the plea, or at any point assured defendant a grant of probation.[3] Defense counsel acknowledged, in defendant's presence immediately after the plea, that if defendant performed poorly pending sentencing or if the court received additional negative information regarding defendant she would not receive any leniency at sentencing (i.e., if

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[3] Despite our conclusion that no judicial plea bargaining occurred *here*, we do not condone comments such as those made by the trial court at the very end of the *Marsden* hearing and to both counsel in chambers, which we have detailed *ante*. Such comments may easily be misunderstood as improper meddling in the settlement process by the trial court, although there is no evidence of such misunderstanding by the parties in this *particular* record. Further, unreported chambers conferences, if held at all, should be immediately put on the record when the parties return to the courtroom to avoid faded recollections, as seen here, and misunderstandings, as alleged here.

"something comes up along the way, that could very well change the Court's perspective of the case. And that would not be good for [defendant]").

The court had earlier communicated to counsel that it was, in both counsels' words, "inclined" to grant defendant probation "provided that she followed all orders of the court and did not commit any new offenses prior to her sentencing." In our view, the court's statement merely expressed its willingness--literally its *inclination*, rather than its promise or guarantee--to grant defendant probation providing she obeyed the court's orders and stayed out of trouble. Thereafter, the court took defendant's plea with no mention of a possible sentence or grant of probation.

Further, the court's statement and subsequent events bear no resemblance to an indicated sentence despite the use of the term "indicated" by defense counsel. An indicated sentence is announced by a trial court when " 'all that remains is the pronouncement of judgment and sentencing' " (*People v. Turner* (2004) 34 Cal.4th 406, 418) and generally when all charges are admitted by defendant and over the objection of the prosecutor, because the parties have failed to reach an agreement. Here, the record shows only that the trial court apparently opined to the parties in chambers that this *was likely* to be a probationary case in its view, despite the need for an unusual case finding, but that its take on the case might well change as events continued to unfold pending sentencing, as the court and defense counsel again articulated after the plea.

Defendant asserts her claim of judicial coercion finds support in *People v. Williams* (1969) 269 Cal.App.2d 879 (*Williams*). There, on the eve of trial, the defendant, along with his wife, his attorney, and the prosecutor, conversed at length with the judge in chambers. During the first hour of discussions, the judge discussed *with the defendant* the anticipated defense to be proffered, the defendant's concern about going back to state prison, and the law regarding the defendant's prior convictions and their impact on the court's ability to grant probation. The judge noted that, were the defendant to plead to some of the counts contained in the information, the court " 'would have the

power to grant probation and would not be compelled to send you to state prison.' " (*Id.* at p. 881.) The judge also told defendant that if he were convicted at trial, he would face mandatory state prison. (*Id.* at p. 882.) The defendant entered a plea of guilty to two counts in exchange for dismissal of the remaining three. (*Ibid.*)

Thereafter, the probation report indicated the defendant was ineligible for probation. (*Williams, supra*, 269 Cal.App.2d at p. 882.) Acknowledging the prior negotiations in chambers, as well as the prosecutor's statement that, "in view of what we have discovered in the law in [section] 1203" it appeared the court did not in fact have discretion, the court sentenced the defendant to state prison. (*Id.* at pp. 882, 883.)

In reversing the sentence, the appellate court noted that, while a judge "may properly give advice to the accused, supplemental to that given by counsel, if justice requires it," "any such advice should be accurate and not coercive." (*Williams, supra*, 269 Cal.App.2d at p. 885.) The court concluded the defendant's plea was not the result of his free and informed choice, and he should have been given the opportunity to withdraw his guilty plea once it was shown that the trial court's representations to the defendant were not entirely correct. (*Ibid.*)

The instant case is nothing like *Williams*, where the trial court not only inserted itself in the process and negotiated directly with defendant for hours, but also *misadvised* defendant on defendant's options and the law. Here, the court met with counsel for both parties in chambers, out of the presence of defendant, in the middle of a pretrial hearing while defendant waited in the courtroom. After a general discussion of the evidence, the trial court opined that probation would be a likely option if defendant showed herself to be a good candidate through the time of sentencing. The parties then reached a plea agreement which made absolutely no mention of the judge's opinion. There was no negotiation and no misrepresentation by the court. No reliance on the court's opinion (or "inclination") appears in the record. As we have described, defendant's own

representations and actions during and after her plea, as well as her counsel's, make it clear that there was no misunderstanding regarding an expected sentence.[4]

The facts before us do not support defendant's claim of judicial plea bargaining, nor is there any evidence the court coerced defendant into entering her guilty plea or even offered defendant an indicated sentence. Defendant's claim fails.[5]

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[4] Admitting she tested positive for methamphetamine and marijuana after her plea and failed to appear for her original sentencing hearing, defendant nonetheless claims she complied with the court's admonitions that she "stay out of trouble" because there was no evidence she committed any new *offenses.* We are not persuaded. As we have described, the discussion between the court and defense counsel in defendant's presence merely confirmed the obvious: that "if something comes up along the way, that could very well change the Court's perspective of the case." Here, the record reflects many things that came up along the way which could understandably change the trial court's preliminary take on defendant's situation to one less likely to reflect unusual circumstances.

[5] Because we conclude no promise of probation was made to defendant, we need not address defendant's argument that she was entitled to specific performance of her plea agreement. Nor do we reach her claim that the trial court incorrectly omitted a section 1192.5 advisement that defendant had the right to withdraw her plea if she did not receive a probationary sentence. That argument, as well, is premised on the claim that the trial court's agreement to consider probation was a promised or indicated sentence, both arguments with which we have disagreed. Finally, we decline to address defendant's argument that her counsel was ineffective for failing to object to her sentence, because we have found no error in the trial court's imposition of a non-probationary sentence, which is defendant's only challenge to her sentence.

DISPOSITION

The judgment is affirmed.

/s/
Duarte, J.

We concur:

/s/
Raye, P. J.

/s/
Nicholson, J.